

UNITED STATES DISTRICT COURT

Northern District of California

Oakland Division

SILGAN CONTAINERS,

No. C 09-05971 RS (LB)

Plaintiff,

v.

**ORDER REGARDING THE PARTIES'  
FEBRUARY 25, 2011 JOINT  
DISCOVERY LETTER**

NATIONAL UNION FIRE INS., *et al.*,

Defendants.

**I. INTRODUCTION**

In this case, Plaintiff Silgan Containers claims that Defendant National Union Fire Insurance Company must insure Silgan for damages caused by defective cans that Silgan sold to Del Monte Corporation to can Del Monte's tomato products. *See* Amended Complaint, ECF No. 37 at 4, ¶¶ 26-28.<sup>1</sup> Del Monte made a claim for \$5.4 million against Silgan, and Silgan reported the claims to its insurers. *See id.* at 3, ¶¶ 23-24. Silgan's primary insurer Liberty Mutual paid the full amount of its \$1.5 million coverage. *See id.* ¶ 27. The case is about whether the remaining amount (roughly \$3.9 million) and some additional costs are covered by the excess umbrella policies. *Id.*, ¶¶ 25-31. The district court phased discovery: phase one (the current phase) addresses whether National Union's umbrella policies cover the loss, and phase two will address whether National Union acted in bad

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<sup>1</sup> Citations are to the Electronic Case File ("ECF") with pin cites to the electronic page number at the top of the document, not the pages at the bottom.

1 faith. 5/24/10 Order, ECF No. 39 at 1-2. The district court referred discovery disputes to this court.

## 2 **II. PENDING DISCOVERY DISPUTES**

3 On February 25, 2011, the parties filed a 30-page single-spaced joint discovery letter (with 150  
4 pages of exhibits) about the following discovery disputes: (A) whether pursuant to this court's  
5 December 21, 2010 order, National Union had to produce all underwriting files for policies issued to  
6 Silgan; (B) whether National Union can withhold documents from the underwriting files that it  
7 claims are subject to privilege; (C) whether the court should require National Union to produce  
8 documents showing the compensation that its expert, Kenneth Neumann and his firm, RGL  
9 Forensics, have received from defense counsel's firm over a five-year period; (D) whether Silgan's  
10 January 10, 2011 notice of non-retained expert testimony that it amended on February 7 and  
11 February 18, 2011 should be stricken as untimely and insufficient, and if not, whether the court  
12 should permit National Union to depose those witnesses more, even though they were deposed on  
13 the topics identified in the disclosures. 2/25/11 Joint Letter, ECF No. 82. The court will address  
14 each issue in turn.

### 15 **A. Production of Underwriting Files**

16 The court previously ruled that the underwriting files were relevant and discoverable:

17 The underwriting file is relevant to determining the risks that National Union expected to cover  
18 in the policy, how it interpreted the various policy terms, and whether the terms of the policy are  
19 ambiguous in the first instance. *See Pentair Water Treatment (OH) Co.*, 2009 WL 3817600 at \*  
20 4 (granting 30(b)(6) depositions regarding underwriting practices and procedures because they  
were relevant to determine the terms of the policy); *Lexington Ins. Co.*, 1999 WL 33292943 at  
\*4-\*6 (ordering the production of all nonprivileged documents from its underwriting files).

21 12/21/10 Order, ECF No. 70 at 10-12.

22 Now National Union is arguing that it should not have to produce all the files, which go back to  
23 1992. Joint Letter, ECF No. No 82 at 1-2, 4-7. It already produced the underwriting files for the  
24 three policies at issue (with a privilege log for withheld or redacted documents). *Id.* at 5. It asserts  
25 that the claims here involve the manufacture and sale of products after November 1, 2004 and before  
26 November 1, 2007, and that the other files (for policies other than the three that span these dates) are  
27 not relevant to the interpretation of contract terms in the three relevant policies. *Id.* Producing all  
28 the files is burdensome because each policy has a separate file, and the underwriting files for the

1 relevant policies contain any relevant information considered by National Union. *Id.* at 6-7. To the  
2 extent that the court orders disclosure of the underwriting files, National Union asks for a protective  
3 order to prevent use of the files in other litigation between the parties. *Id.*

4 Silgan counters that all policies contain essentially the same terms covering essentially the same  
5 risk. *Id.* at 2. In support of its argument that all files are relevant to construing contract terms and  
6 risks, it cites documents already produced from the underwriting files that reference previous  
7 underwriting files and agreements. *Id.*

8 The court's previous order ordered disclosure of the underwriting file. National Union did not  
9 argue burden then or ask to limit the years of disclosure. Given that the files all relate to policies  
10 issued to Silgan for similar risks, and the policies have similar terms, the policies appear relevant for  
11 the reasons articulated in the court's December order. Silgan also points to documents from the  
12 disclosed files cross-referencing dates back to 1998. *Id.* at 3. On this record, the court is not  
13 prepared to limit the years. Also, disclosure of files relating only to Silgan does not seem  
14 particularly burdensome. National Union is really concerned about a protective order because of  
15 other litigation with Silgan, but the parties submitted a stipulated protective order on March 14,  
16 2011, *see* ECF No. 88, and the court issues that order with this order.

17 National Union is ordered to produce the underwriting files.

18 Silgan also asked for its attorney's fees. The court denies that request. The bottom line here is  
19 that the parties continue to argue about discovery issues that they ought to work out themselves. On  
20 balance, National Union appears more unreasonable, but neither party is without fault. Also, it is  
21 not outside the ballpark to ask to limit the years of production (even though National Union should  
22 have raised it in the earlier discovery letter). Finally, asking for a protective order is not  
23 unreasonable.

24 **B. Production of Privileged Documents from Underwriting Files**

25 The parties also argue about whether National Union may withhold documents from the  
26 underwriting files as privileged or confidential. *See* 2/25/11 Joint Letter, ECF No. 82 at 7-12.  
27 Boiled down, Silgan's position is that the garden-variety business documents in underwriting files  
28 are not protected work product or privileged. *Id.* at 7-10 (analyzing cases). Also, Silgan rejects

1 National Union's position that it is entitled to redact information about claims other than the tomato  
2 claims that are the subject of this lawsuit. *Id.* at 9-10. The reason, Silgan argues, is that this court  
3 already ruled that the underwriting files (involving essentially the same contract terms and risks) are  
4 relevant. *Id.* National Union responds – but without any case-specific examples – that information  
5 can be privileged and protected from disclosure. *Id.* It also is concerned about use in other litigation  
6 between the parties. *Id.*

7 The bottom line with this dispute is that it is not this court's intent that National Union withhold  
8 information about non-tomato claims, particularly given its failure to raise the issue before and the  
9 essentially similar contract terms and risks (and the relevancy to the risks covered in the applicable  
10 policies, how National Union interpreted the policy terms, and whether the terms were ambiguous).  
11 The court already ruled this way in December, and it reiterated that ruling in the previous section.  
12 Moreover, for the reasons discussed by Silgan in the joint letter, the court agrees that material in  
13 underwriting files is not likely to be protected work product or privileged. National Union's concern  
14 about use in other litigation is fair, but the protective order takes care of the concern. Beyond that,  
15 the court is not going to guess at potential work product and privilege claims or give some kind of  
16 advisory opinion. If the parties have a dispute, they need to raise it in accordance with the  
17 procedures for privilege logs in this court's standing order:

18 If a party withholds material as privileged, *see* Fed. R. Civ. P. 26(b)(5) and 45(d)(2)(A), it must  
19 produce a privilege log as quickly as possible, but no later than fourteen days after its disclosures  
20 or discovery responses are due, unless the parties stipulate to or the Court sets another date.  
21 Privilege logs must contain the following: (a) the subject matter or general nature of the  
22 document (without disclosing its contents); (b) the identity and position of its author; (c) the date  
23 it was communicated; (d) the identity and position of all addressees and recipients of the  
24 communication; (e) the document's present location; (f) the specific privilege and a brief  
25 summary of any supporting facts; and (g) the steps taken to ensure the confidentiality of the  
26 communication, including an affirmation that no unauthorized persons received the  
27 communication.

28 The idea here is that in the unlikely event that National Union has some real claim of work product  
or privilege, it must produce a proper privilege log so that Silgan can evaluate the claim fairly. If  
both parties play by the discovery rules, and justify any information withheld, there often is no need  
to involve the court. And if there is, the court's review goes much faster than the 180 pages in this  
current dispute allowed. Accordingly, both parties are directed to comply with this court's standing

order regarding claims of privilege and thereafter submit any disputes (and there really should not be any in this area) to the court by the joint letter process.

**C. Disclosures Regarding Expert Kenneth Neumann and RGL Forensics**

On January 6, 2011, Silgan requested information about National Union's expert, Kenneth Neumann, and his firm, RGL Forensics. 2/25/11 Joint Letter, ECF No. 82-10 at 2-3, Exh. J. On February 2, 2011, National Union responded to the requests. *Id.* at ECF No. 82-11, Exh. K. The requests and responses are as follows:

RFP1: His retainer agreement with your firm or AIG/National Union in this case.

REPLY: National Union objects to this Request to the extent it seeks information or documents broader than those permitted by Rule 26(b)(2)(B) and 26(b)(4)(C). National Union further objects to the extent this Request is directed to "AIG" because "AIG" is not a party to this litigation. National Union further objects that this request seeks documents or information protected from disclosure by Federal Rule of Civil Procedure 26 and by the attorney client privilege and work product immunities. Subject to and without waiving these objections or the General Objections set forth above, National Union states that no written retainer agreement exists with Mr. Neuman for this case. Mr. Neuman's rate, as set forth in his expert report, is \$240 per hour.

RFP2: Any retainer agreements he and/or his firm has had with your firm or AIG/National Union in prior cases over the past ten years.

REPLY: National Union objects to this Request to the extent it seeks information or documents broader than those permitted by Rule 26(b)(2)(B) and 26(b)(4)(C). National Union further objects to the extent this Request is directed to "AIG" because "AIG" is not a party to this litigation. National Union further objects to this Request because it seeks documents, communications, and information protected by the attorney-client privilege, work product immunity, joint defense agreements in other unrelated litigation, or confidential, trade secret and proprietary information, and because this Request seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections or the General Objections set forth above, National Union states that it is not obligated to create a document summarizing the requested information; and compiling such documents would be unduly burdensome, oppressive, and not reasonably limited in scope or time.

RFP3: His statements to your firm or National Union for the work he has done on this case.

REPLY: National Union objects to this Request to the extent it seeks information or documents broader than permitted by Rule 26(b). National Union further objects to this Request because it seeks statements that are beyond the scope of expert discovery and necessarily contain privileged communications between National Union and Mr. Neuman, which are protected by Rule 26(b)(4)(C), as well as documents or information protected from disclosure by the attorney client privilege and work product immunities. Subject to and without waiving these objections or the General Objections set forth above, National Union agrees to produce "a statement of the compensation to be paid for the study and testimony in the case" prior to Mr.

1 Neuman's deposition.

2 RFP4: Documents sufficient to show (1) the percentage of his gross income earned for each  
3 of the preceding five years attributable to performing consulting or expert witness  
4 services on behalf of AIG, National Union, or other insurance companies, and/or  
5 attorneys defending AIG, National Union or other insurance companies; (2) a list of  
6 cases in which he or RGL has provided such services during the last five years, in  
sufficient detail to enable us to locate the court file, and/or issue a subpoena for it; (3)  
the name of each insurance company for which he or RGL has provided services as a  
consultant or expert witness for the preceding ten years. *See Behler v. Hanlon*, 199  
F.R.D. 553, 562 (D. Md. 2001).

7 REPLY: National Union objects to this Request to the extent it seeks information or  
8 documents broader than permitted by Rule 26(b). National Union further objects to  
9 this Request on the grounds that National Union is not in the possession or control of  
10 such documents; National Union nor Mr. Neuman are obligated to create a document  
11 summarizing such information; and compiling such documents would be unduly  
12 burdensome, oppressive, and not reasonably limited in time or scope. Further,  
13 National Union objects to this Request because it seeks documents that are privileged  
14 and confidential information; and documents to which National Union is not privy  
15 and does not have possession, custody or control. National Union further objects to  
16 this Request because it seeks information that is proprietary, as well as documents  
subject to joint defense agreements, confidentiality or protective orders in other  
litigation, or information relating to other claims or litigation that is protected from  
disclosure by Rule 26(b)(4)(D). National Union further objects that this request seeks  
documents or information protected from disclosure by the attorney client privilege  
and work product immunities. National Union further objects that the Request is  
overly broad, unduly burdensome, oppressive, and not reasonably limited in time or  
scope, seeks documents that are not relevant or reasonably calculated to lead to the  
discovery of admissible evidence, and imposes upon National Union a burden and  
expense in responding that outweighs any likely benefit to Silgan.

17 Subject to and without waiving these objections or the General Objections set forth  
18 above, National Union has already produced a list of cases in which Mr. Neuman has  
testified as an expert over the last four years as required by Rule 26(b)(2)(B)(v).

19 2/25/11 Joint Letter, ECF No. 82-10 at 2-3, Exh. J; ECF No. 82-11 at 2-7, Exh. K. National Union  
20 also lodged additional boilerplate objections. *Id.* at 2-3, Exh. K. Silgan agreed to modify the fourth  
21 request to cover only expert witness services, not consulting services. ECF No. 82 at 15.

22 Silgan generally contends that these requests for documents are relevant to show bias and  
23 prejudice, and courts routinely grant similar requests. ECF No. 82 at 13-16. National Union  
24 responds that under Rule 34, it is not required to produce documents that it does not have in its  
25 possession or control or create documents that do not exist. ECF No. 82 at 16-17 (asserting that it  
26 does not have documents relating to “every instance in which [Mr. Neumann or RGL Forensics]  
27 have been retained as a testifying or non-testifying [*sic*] on behalf of National Union, or any  
28 insurance company, for the last ten years”). Also, if Silgan wants broader disclosures from Mr.



1 Neumann or RGL Forensics, it should have served them with subpoenas. *Id.* Finally, National  
2 Union argues that production is burdensome, *id.* at 17-19, Silgan has failed to show Mr. Neuman is  
3 biased, *id.* at 19, and any information should be produced pursuant to a protective order. *Id.* at 20  
4 n.4.

5 The court will address each request in turn.

6 *a. Mr. Neumann's Retainer in This Case*

7 To the extent that National Union has a retainer agreement or additional information with respect  
8 to any compensation given from National Union to Mr. Neumann in this case, it must produce it.  
9 *See* Fed. R. Civ. P. 26(a)(2)(B)(vi) (requiring production of "a statement of the compensation to be  
10 paid for the study and testimony in the case."). National Union contends that it does not have a  
11 retainer agreement with Mr. Neumann but that it is paying him \$240 per hour in this case. 2/25/11  
12 Joint Letter, ECF No. 82 at 17. Rule 26(a)(2)(B)(vi) does not mandate only National Union's  
13 disclosure of Mr. Neumann's hourly rate. Instead, it requires National Union to produce any  
14 information regarding "compensation." Fed. R. Civ. P. 26(a)(2)(B)(vi); *see also Cary Oil Co., Inc.*  
15 *v. MG Refining & Marketing, Inc.*, 257 F. Supp. 2d 751, 756-57 (S.D.N.Y. 2003). National Union  
16 must produce all information it has regarding Mr. Neumann's compensation in this case. (Given  
17 National Union's reply to the third request for production, *see supra* p. 5, it may have already  
18 provided this information).

19 *b. Mr. Neumann and RGL Forensics' Retainers in Other Cases*

20 Silgan asks for retainers with National Union, Chartis, and AIG for the past 10 years. ECF No.  
21 82-10 at 2, Exh. J.

22 The first issue is, what entities are implicated by this request. Silgan argues that National Union  
23 must disclose all information in the possession of National Union, Chartis, and AIG because they are  
24 the same entity. *Id.* at 14. National Union apparently does not dispute that to the extent that they are  
25 the same companies, information from the companies is implicated by the requests for production.  
26 This conclusion is illustrated by the joint letter, which does not raise a "separate entity" argument as  
27 to Chartis, and Chartis claims administrator Jennifer Sigman's declaration about the costs Chartis  
28 would incur responding to Silgan's requests. *See* ECF No 82-15, Exh. O. AIG, on the other hand, is

1 the parent company. That relationship (at least based on this record) is too attenuated for the court  
2 to order document disclosure from AIG. The record does show that Chartis (the claims  
3 administrator) is the entity previously known as AIG Domestic Claims. Joint Letter, ECF No. 82 at  
4 14. Based on this, the court's order extends to National Union and to Chartis. *See* Jennifer Sigman  
5 Declaration, ECF No. 82-15 at 2, ¶ 1, Exh. O (Chartis, as the claims administrator, is responsible for  
6 coordinating the litigation, including discovery responses, on behalf of National Union).

7 The second issue is whether National Union/Chartis should produce retainer agreements about  
8 Mr. Neumann for the past ten years. Silgan contends that these requests correspond to what courts  
9 routinely grant in similar situations. ECF No. 82 at 13-16. National Union objects that the request  
10 is burdensome. *See* Declaration of Jennifer Sigman, ECF No. 82-15 at 2.

11 The information Silgan seeks about National Union's past and present relationship with Mr.  
12 Neumann is the type of discovery that courts grant routinely because it is relevant to bias or  
13 prejudice. *See Behler v. Hanlon*, 199 F.R.D. 553, 561 (D. Md. 2001); Fed. R. Civ. P. 26. Contrary  
14 to National Union's assertion, Silgan need not identify a particular instance that supports its  
15 contention of bias before it is entitled to this sort of information. *See, e.g., Behler*, 199 F.R.D. at  
16 561; *Cary Oil Co.*, 257 F. Supp. 2d at 756-57. Like the court in *Behler*, the court limits the time  
17 period to five years.

18 On this record, however, the court cannot conclude that producing similar information about  
19 RGL is worth the substantial burden and expense identified by National Union. *See* Fed. R. Civ. P.  
20 26(b)(2)(C)(iii); Sigman Declaration, ECF No. 82-15 at 4-5, ¶¶ 7-14, Exh. O. Therefore, Silgan's  
21 request for retainer agreements between RGL and National Union in other cases is denied.

22 *c. Mr. Neumann's Billing Statements For the Work Done In This Case*

23 These statements are relevant and discoverable. Fed. R. Civ. P. 26(a)(2)(B) (the pre-December  
24 1, 2010 Rule). National Union says that it has already produced the statements. ECF No. 82 at 18.  
25 This is the same information discussed in category (a) on page 7. If there is more to produce,  
26 National Union should produce it.

27 ///

28 ///



1 *d. Percentage of Income Mr. Neumann Earned in Past Five Years From Insurance*  
2 *Companies*

3 Information about the percent of Mr. Neumann's gross income from the past five years that he  
4 earned from expert witness services on behalf of insurance companies is relevant to bias or prejudice  
5 and therefore, discoverable under Rule 26. *See Behler*, 199 F.R.D. at 562 (granting this discovery  
6 for this same five-year time period). Silgan requested these documents, however, from National  
7 Union, not Mr. Neumann. 2/25/11 Joint Letter, ECF No. 82-10 at 2-3. Pursuant to Rule 34, a party  
8 is not required to produce documents that are not in its possession, custody, or control. Fed. R. Civ.  
9 P. 34(a)(1). If National Union has this information, it should produce it. If not, the court strongly  
10 suggests that National Union obtain this information from Mr. Neuman and produce it. This  
11 information is readily available to Mr. Neumann, and it is relevant and discoverable. National  
12 Union also has a stake in getting the information and producing it in an orderly, accessible fashion.  
13 The alternative is that Silgan can serve a subpoena for the same information under Federal Rule of  
14 Civil Procedure Rule 45. *See Behler*, 199 F.R.D. at 562 (granting this type of discovery after the  
15 plaintiff served an insurance company's expert with a subpoena).

16 *e. List of Cases From the Past Five Years From Mr. Neumann and RGL*

17 Information regarding the cases in which Mr. Neumann has provided expert witness services  
18 over the past five years is relevant to proving bias or prejudice and is therefore discoverable. *See*  
19 Fed. R. Civ. P. 26(a)(2)(B)(v); *Behler*, 199 F.R.D. at 562 (granting this discovery). Though Rule 26  
20 only requires National Union to produce information corresponding to cases in which Mr. Neumann  
21 testified at trial or by deposition in the past four years, it does not foreclose additional discovery if  
22 the information sought is relevant and discoverable. Advisory Comm. Notes on 1993 Amendments  
23 to Fed. R. Civ. P. 26 (Rule 26 does not limit parties from using traditional discovery methods to  
24 obtain information about "testimony given in other litigation beyond the four-year period specified  
25 in Rule 26(a)(2)(B)"). Again, contrary to National Union's contention, Silgan does not have to  
26 show an additional basis – beyond relevance – for gaining more information than Rule 26 requires.  
27 *See Moses v. Halstead*, 236 F.R.D. 667, 677 (D.Kan. 2006) ("requests for documents are not  
28 objectionable merely because they seek documents outside the scope of the expert disclosures

1 required by Rule 26(a)(2)(B)”). Finally, nothing in the record suggests that Mr. Neumann cannot  
 2 provide this information, and National Union has a stake at being involved in the disclosure process.  
 3 In sum, given the relevance and the time frames at issue in this case, the court orders disclosure for  
 4 the five-year period.

5 But on this record, and for the reasons previously articulated, the court cannot assume that Mr.  
 6 Neumann’s potential bias is co-extensive with his affiliation with RGL. Therefore, National Union  
 7 does not have to produce a list of cases in which RGL has provided expert witness services.

8 *f. Names of Insurance Companies for whom Mr. Nuemann and RGL Have Provided Expert*  
 9 *Witness Services Over the Past 10 Years*

10 For the reasons stated in the previous sections, the information is relevant to Mr. Neumann’s bias  
 11 or prejudice, and it is discoverable. *See Behler*, 199 F.R.D. at 562 (granting this type of discovery  
 12 for 10 years prior to the litigation). National Union cites *Sullivan v. Metro N. R.R. Co.*, No.  
 13 3:05cv6655 (AHN), 2007 U.S. Dist. LEXIS 88938, at \*2 (D.Conn. Nov. 30, 2007) in support of its  
 14 argument that the request is “overkill,” *see* 2/25/11 Joint Letter, ECF No. 82 at 19-20, but that court  
 15 permitted deposition testimony about these precise categories of information. *See Sullivan*, 2007  
 16 U.S. Dist. LEXIS at \*8-\*9 (plaintiff sought information for five years). The court limits the  
 17 information to the past five years. That is reasonable given the facts of this case. The court  
 18 observes (to Silgan) that at some point, that kind of impeachment evidence has attenuated relevance  
 19 to the trier of fact.

20 For the reasons stated in the prior sections, and based on this record, the information is limited to  
 21 Mr. Neumann and does not extend to RGL.

22 *g. Protective Order*

23 The parties filed a stipulated protective order on March 14, 2011, *see* ECF No. 88, and this court  
 24 simultaneously grants it with this order. This disposes of National Union’s request in the letter brief  
 25 for a protective order.

26 **D. Silgan’s Notice and Amended Notices of Non-Retained Expert Testimony**

27 National Union argues the court should strike expert disclosures that Siglan made on January 10  
 28 2011, 48 days after the district court’s November 23, 2010 deadlines. 2/25/11 Joint Letter, ECF No.

1 82 at 21. It also contends that until the February 18, 2011 amended disclosures, the disclosures were  
2 insufficient because they did not identify the “specific subject matter or the specific facts and  
3 opinions” of the expert testimony. *Id.* The February 18 disclosures defined the expert testimony by  
4 referencing excerpts of their depositions, and National Union accepts those quotations but asserts  
5 that it is entitled to depose the witnesses if Silgan intends the “broad list of subject matter, facts, and  
6 opinions listed at the beginning of its February 18th Amended Disclosures” to broaden the expert  
7 testimony beyond the deposition excerpts. *Id.* at 23.

8 Silgan responds that the witnesses are rebuttal witnesses, that are not subject to any deadline in  
9 the district court’s case management order. *Id.* at 24. Also, Silgan served its disclosures only after  
10 receiving National Union’s expert disclosures on December 21, 2010. *Id.* While Silgan did not  
11 specify that the witnesses were rebuttal experts only (or call the report a Rule 26(a)(2)(C) report),  
12 that information is evident from the content of its disclosures that the witnesses would rebut  
13 testimony from National Union’s expert, Peter Cocotas. *Id.* Similarly, on January 12, 2011, Silgan  
14 gave National Union its formal expert rebuttal report for Jay Unverferth, who will also rebut Mr.  
15 Cocotas’ testimony. *Id.* Also, generally these are fact witnesses, and Silgan says that it designated  
16 the witnesses as expert witnesses out of an “abundance of caution” and “to make sure that National  
17 Union could not later claim any surprise at their testimony – whether viewed as ‘fact’ or ‘expert’.”  
18 *Id.* at 25. Finally, Silgan argues that the disclosures have enough detail, no further depositions are  
19 needed, and it should be awarded fees for another frivolous request. *Id.* at 25-26.

20 The court addresses the timeliness of the disclosures and the adequacy of the disclosures  
21 separately.

22 *a. Timeliness of Disclosures*

23 The witnesses probably are fact witnesses and at most are rebuttal expert witnesses. The district  
24 court’s order is silent on timing of rebuttal disclosures, which means that the Federal Rules govern.  
25 Rebuttal disclosures are due 30 days after the other party’s disclosures. Fed. R. Civ. P.  
26 26(a)(2)(D)(ii). The amended disclosures, which defined the expert testimony in terms of previous  
27 deposition testimony, were an appropriate response to National Union’s argument about the  
28 sufficiency of the disclosures. *See also* Fed. R. Civ. P. 26(e)(1)(A) (requiring a party to supplement

disclosures in a timely manner if the original disclosure is “incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing”). Here, Silgan really is compensating for National Union’s scorched earth attacks on all of its disclosures. The witnesses had been deposed, they generally are fact witnesses, and to the extent that their testimony rebuts National Union expert Peter Cocotas’s testimony, Silgan called it out by referencing the portions of their deposition testimony. Silgan also is offering “expert” testimony that is the same testimony by the witnesses at their depositions. 2/25/11 Joint Letter, ECF No. 82 at 23. The court sees only disclosure to National Union at the depositions, overcompensation by Silgan during a time period consistent with rebuttal expert testimony, and absolutely no prejudice to National Union.

*b. Substance of the Disclosures*

Silgan’s rebuttal disclosures satisfy the requirements of Rule 26(a)(2)(C). That rule provides that if a witness is not required to provide a written report, the disclosure should identify (1) the witness that the party may call to testify, (2) the subject matter on which the witness is expected to testify, and (3) a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C). National Union accepts that the block quotations on pages 3-34 of Silgan’s February 18, 2011 disclosure satisfy Silgan’s obligation to provide a summary of the facts and opinions to which the witnesses will testify. 2/25/11 Joint Letter, ECF No. 82 at 23 and ECF No. 82-18 at 4-35, Exh. R. Thus, the court need consider only whether Silgan’s disclosures sufficiently identify the subject matter on which the witnesses are expected to testify. In its February 18, 2011 disclosure, Silgan identifies the following four subject matters:

1. The cause of the corrosion in the defective tomato cans.
2. The adulteration of the products and the threat to the health of consumers.
3. Whether, from a commercial standpoint, Del Monte could risk selling defective tomato products to the public and whether they were commercially saleable.
4. The chemical reaction between the cans and tomato product and the effect on the shelf life of the products.

ECF No. 82-18 at 2, Exh. R. The February 18, 2011 disclosure also contains a brief summary of the facts and opinions about which Silgan expects the witnesses to testify and 31 pages of deposition excerpts corresponding to each witness. *Id.* at 3-35. The court finds that Silgan sufficiently

1 articulated the subject matter upon which the witnesses will testify. Accordingly, National Union's  
2 motion to strike Silgan's disclosures as inadequate and untimely is denied.

3 *c. Depositions*

4 National Union now wants to depose the witnesses, who already were deposed, because they did  
5 not investigate the basis of potential opinion testimony, and in any event, for four witnesses it  
6 deposed under Rule 30(b)(6), those witnesses provided information on behalf of the corporation, not  
7 as individuals. ECF No. 82 at 26-27. Silgan counters that the witnesses will testify only about  
8 matters in their depositions. *Id.* at 28-29. The court denies further depositions. The burden and  
9 expense of further depositions outweighs their utility (particularly given that the court can ascertain  
10 no benefit). The bottom line here is that Silgan will only offer testimony consistent with that in the  
11 depositions that already were taken.

12 *d. Attorney's Fees*

13 The whole point of the joint letter process is to avoid motions. That saves fees. Silgan's  
14 disclosures – while a reaction to National Union's tactics – probably should have been in the form of  
15 the amended February disclosures from the get-go. For that reason, the court denies fees and costs.

16 **III. FUTURE DISCOVERY DISPUTES**

17 The court's process is designed to allow side-by-side evaluation of issues, and this joint letter  
18 brief is better than the last two. But the parties' antipathy toward each other means that their  
19 arguments are not always point by point, and that impedes this court's review. For example, a  
20 request-by-request analysis of the document productions in the joint letter would have allowed a  
21 faster review of the arguments. As it is, the letter brief had a quality of "don't have to" and "do  
22 too," and the court had to search for the arguments amidst the venom. That kind of relationship  
23 between parties drives up client costs, and it slows down discovery review.

24 In part, this may be because the court – in an attempt to minimize costs for clients – has allowed  
25 the parties to confer by telephone rather than meet in person (as the court's standing order requires).  
26 Similarly, the court has allowed telephonic discovery hearings (a process that only confirms to the  
27 court that the parties are not collaborating at all on discovery obligations that are laid out in the  
28 rules).

If that process does not enable the parties to resolve their dispute, the parties must participate in a telephone conference with the court before filing the letter brief contemplated by this court's standing order. To request a telephone hearing, the parties must file a joint letter not to exceed four pages (with no attachments) that briefly explains the nature of the dispute. The court will contact the parties to schedule the conference.

Dated: March 23, 2011

C 09-05971 RS (LB)  
ORDER RE 2/25/11 DISCOVERY LETTER